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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Policies and Rules Governing	)	
Interstate Pay-Per-Call and	)	CC Docket 96-146
Other Information Services Pursuant	)	
to the Telecommunications Act	)	
of 1996	)	

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COMMENTS OF THE
DIRECT MARKETING ASSOCIATION

I. INTRODUCTION AND SUMMARY

The Direct Marketing Association, Inc., ("DMA") supports the Commission's continued efforts to combat fraud and unjust or unreasonable practices in connection with pay-per-call telephone service, but has a specific concern with one of the proposals in this proceeding. DMA is the leading trade organization representing direct marketers, comprised of a broad coalition of over 3,500 domestic and international corporations and businesses. Our members collectively utilize virtually every form of direct marketing technique, from solicitations sent to consumers through the mail, and inbound and outbound telephone marketing, to revolutionary new computer technologies.

Preservation of the integrity of telephone service as a direct marketing vehicle is absolutely vital to the success of DMA members' businesses. DMA, therefore, agrees with the goals underlying the Commission's proposed rule modifications, which are generally designed to eliminate consumer confusion

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between toll-free calls and those for which there is a per-call or per-time interval charge. However, DMA believes that the per se presumption that the Commission intends to apply when an information service provider ("IP") receives "any form of remuneration" from a carrier must not be adopted in its proposed form. First, and foremost, the Commission should explicitly clarify that this rule (the "per se rule"), whether as proposed or ultimately modified, will not apply to calls that are free to consumers. Second, the proposed standard is, in any event, too broad. It fails to account for arrangements between IPs and carriers that benefit all parties, including consumers. It will place needless burdens on the use of truly free services that are valued by consumers, and that do not create the possibility of confusion or fraud. If a per se rule is adopted at all, it should be narrowly drawn to apply only when the relationship between the carrier and the IP is related exclusively to information services and the consumer is required to pay a charge for the transmission of the call that exceeds the norm.

II. THE PROPOSED *PER SE* RULE IS OVERBROAD

The proposed per se rule is designed to reinforce the Congressional decision removing the "tariffed services" exception to the pay-per-call regulations.[1/] Congress quite properly took this step to prevent IPs from evading

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1/ Pub. L. No. 104 - 104, 110 Stat. 56 (1996), to be codified at 47 U.S.C. § 228(i)(2).

those rules simply by filing tariffs that cover their information services. However, the Commission apparently remains concerned that some unscrupulous IPs may, for example, continue to receive commissions or "kick-backs" from carriers on calls for which the carrier imposes a high tariffed rate, with the result that consumers are charged for information which has been misleadingly characterized as "free." To address this possibility, the Commission has tentatively concluded that "any form of remuneration" from a carrier to an IP, or "any reciprocal arrangement" between them, shall constitute per se evidence that the amount charged for the call exceeds the "charge for transmission of the call" and, therefore, the service is subject to this Commission's pay-per-call rules.

It is these arrangements, in which there is a "hidden charge," or in which consumers are led to believe that the information they will receive is "free" when that is not the case, that diminish the integrity and value of telephone service as a direct marketing tool. Thus, the Commission's concern may be well founded. The Commission's proposed solution is not.

First, the Commission must make it absolutely clear that arrangements in which the consumer does not pay for either the call or the information are not subject to the proposed per se rule. That is, where toll-free numbers are used for their traditional purpose of providing free information or for order-taking, the pay-per-call rules are categorically inapplicable. The Commission acknowledges that the policy justification for the imposition of per se will exist only "when a common carrier charges a telephone subscriber for a call to an interstate information service."[2] When there is no charge for the call or for the information imparted to the consumer as a result of the call, the fact that there may be "remuneration" from the carrier to the IP, or some form of "reciprocal arrangement" between them, is utterly irrelevant. The Commission must make it unmistakably clear that it does not intend its per se rule to be used as a vehicle for bringing traditional toll-free services within the ambit of the pay-per-call regulations.

Even in cases in which consumers *do* pay a charge for transmission of the call, the proposed rule sweeps too broadly. In the first instance, it would encompass compensation or reciprocal arrangements that are wholly unrelated to the provision of an information service. For example, an IP might use the number (202) 123-4567 to provide stock quotations or to provide information about products or services it sells. Calls to such a service will result in a toll charge to callers. At the same time, the IP may also utilize an 800 number, for unrelated purposes, and for which it receives a carrier discount based on call volume. Similarly, IPs may enjoy reduced rates for carrier services pursuant to barter arrangements, in exchange for advertising, endorsements, or other valuable IP services. Under the Commission's proposal, these arrangements

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2 Policies and Rules Governing Interstate Pay-Per-Call and Other Information Services Pursuant to the Telecommunications Act of 1996, Notice of Proposed Rulemaking ("NPRM"). ___ FCC Rcd. ___, ¶48 (1996).

would seem to constitute prohibited forms of "remuneration" that would effectively force the IP to convert its information line to a 900-number line. This makes no sense: These mutually beneficial agreements, based on the parties' sound judgment about their respective business needs and resources, have nothing at all to do with the IPs' provision of information services and do not cause confusion or harm to consumers.

The rule is over inclusive in another respect: It would result in treating services for which the consumer pays no more than the normal toll charge as fully subject to the pay-per-call rules. This would plainly conflict with the express statutory definition of a pay-per-call service.[3] Beyond this, the Commission itself has recognized that "there may be some truly free information services that callers might wish to access through a toll call."[4] In fact, there are. So long as a call to this type of information service does not result in a charge over and above the normal toll fee, there is utterly no possibility of consumer confusion and no justification for subjecting these calls to the pay-per-call rules. Consumers surely understand that calls made to area codes other than those that are denominated as toll-free will result in a relatively moderate per-minute charge on their phone bills, even when the information that they obtain as a result of the call is "truly free." As long as the charge for the call does not exceed reasonable consumer expectations, there is no reason to subject these free information services to

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[3] 47 U.S.C. §228(i)(1)(B).

[4] NPRM at ¶48.

regulation merely because of mutually beneficial arrangements between the IP and the carriers. Indeed, imposing pay-per-call rules on these types of perfectly legitimate and valuable services will add to consumer confusion, thus impairing the value of telephone service as a direct marketing technique.

These results are not what Congress intended when it removed the tariffed service exemption. Nor, do we believe, did the Commission intend the kinds of consequences described above in its formulation of the per se rule concept. Although we recognize that use of a presumption simplifies and expedites enforcement, and that a per se rule affords greater clarity in enforcement, these considerations do not support the imposition of pay-per-call regulations on practices which are not harmful to consumers and do not threaten the integrity of telephone service as an information marketing medium.

III. CONCLUSION

While attempting to prevent fraudulent practices is a laudable objective, the Commission must not lose sight of its responsibility to foster competition, business enterprise, and widespread and efficient use of existing and emerging technologies. The Commission's proposed per se rule fails to achieve this balance, encumbering a host of valuable and valued information services, as well as compensation arrangments, without regard for how useful and necessary these are for carriers, businesses, and consumers. DMA is inclined to believe that the matter of potential abuses resulting from elimination of the tariffed services exemption should be dealt with on a case by case basis until such time as the precise nature of abuses, if any, becomes known and a remedy can appropriately be fashioned. At the very least, DMA urges that any per se rule be strictly limited to cases in which (i) the remuneration or reciprocal relationship between the carrier and IP is related directly and exclusively tied to the information service, and (ii) the consumer is required to pay a charge for the transmission of the call that is greater than the charge imposed by the carrier for calls that do not involve a payment of remuneration or other arrangement with the IP.

Respectfully Submitted,

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